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11
 12 **UNITED STATES DISTRICT COURT**
 13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 JUAN MENDOZA and AGUSTIN) Case No. 07-CV-0056 BTM (POR)
15 FERNANDEZ, individually and on behalf of all)
16 other persons similarly situated and on behalf of) JOINT MOTION FOR APPROVAL OF
17 the general public,) SETTLEMENT AND STAY OF CLASS
18) CLAIMS PENDING RESOLUTION OF
19 Plaintiffs,) STATE COURT ACTION
20 vs.)
21) Hearing: TBD
22) Time: TBD
23 DIAMOND ENVIRONMENTAL SERVICES,) Courtroom: 15
24 LLC, a California limited liability company;)
25 ERIC DE JONG, an individual; and DOES 1) [NO ORAL ARGUMENT PER LOCAL
26 through 100, inclusive,) RULE]
27)
28 Defendants.)

23 **I.**

24 **INTRODUCTION.**

25 Plaintiffs and Defendants, through their respective counsel of record, have reached a tentative
 26 settlement of this entire action, including the corresponding state court action. In connection
 27 therewith, Plaintiffs and Defendants hereby seek an order of this Court (i) approving the settlement
 28 of claims raised by Plaintiffs Juan Mendoza and Augustine Fernandez in this case for \$30,000 each;

1 and (ii) staying the claims of the non-certified putative class of employees in this action pending
 2 pursuit and resolution of those claims in the corresponding state court action entitled *Kevin*
 3 *Hernandez and Raphael Cervantes v. Diamond Environmental Services, LLC* (San Diego Superior
 4 Court Case No. 37-2007-00051019-CU-OE-NC).

5 II.

6 FACTUAL BACKGROUND & PROCEDURAL HISTORY.

7 A. Nature Of The Case.

8 Plaintiffs originally brought this case in San Diego Superior Court contending that
 9 Defendants DIAMOND ENVIRONMENTAL SERVICES, LLC and its principal ERIC DE JONG
 10 violated both federal and state wage and hours laws by misclassifying Plaintiffs and the putative
 11 class of Pumper Drivers¹ as salaried employees exempt from certain wage and hour laws. Plaintiffs
 12 allege that the Pumper Drivers are entitled to overtime wages for all hours worked in excess of 8
 13 hours per day and/or 40 hours per week, were improperly denied meal and/or rest periods and
 14 entitled to *California Labor Code section 203* penalties, interest, attorney fees, restitution for
 15 unlawful business practices under *California Business & Professions Code section 17200 et seq.*,
 16 and other related matters. Plaintiffs are informed and believe the putative class includes
 17 approximately 80 Pumper Drivers employed primarily within San Diego County.

18 B. Procedural History.

19 There are two pending actions seeking class certification, economic damages and injunctive
 20 relief on behalf of a putative class of Pumper Drivers employed by Defendants - this case (hereinafter
 21 known as “*Mendoza*”) and San Diego Superior Court Case No. 37-2007-00051019-CU-OE-NC
 22 entitled *Kevin Hernandez and Raphael Cervantes v. Diamond Environmental Services, LLC*, et al.
 23 (hereinafter known as “*Hernandez*”). Both *Mendoza* and *Hernandez* arise from the same general
 24 set of facts and circumstances and, except as set forth below, affect the same putative class of
 25 Pumper Drivers. The parties in both cases are each represented by the same respective counsel.

26
 27
 28 ¹Pumper Drivers were responsible for driving a truck to work sites through San Diego County to
 service portable restrooms, pumping waste and cleaning and restocking the portable restrooms and the
 service truck.

The Mendoza Matter

This *Mendoza* matter was filed on December 11, 2006 in San Diego Superior Court. Defendants removed *Mendoza* to federal court on January 9, 2007, based upon Plaintiffs' claims that Defendants violated the Fair Labor Standards Act ("FLSA"). On March 1, 2007, Plaintiffs filed a motion for leave to amend the complaint to eliminate any FLSA claims and a simultaneous motion to remand *Mendoza* to San Diego Superior Court. Defendants only contested the motion to remand. These motions are still pending. The *Mendoza* class is defined as: "all persons who were employed as a "Pumper Driver" at any Diamond work site in the State of California (the "Class") during the period commencing from December 11, 2002 up until the date of trial (the "Class Period")." Baker Decl. ¶3; Compl. ¶41. This class has not yet been certified.

The Hernandez Matter

On February 10, 2007, Plaintiffs Kevin Hernandez and Raphael Cervantes filed the *Hernandez* action in San Diego Superior Court, alleging the exact same claims as *Mendoza*, but eliminating any FLSA claims. The *Hernandez* class is defined as: “all persons who were employed as a “Pumper Driver” at any Diamond work site in the State of California (the “Class”) during the period commencing from February 10, 2003 up until the date of trial (the “Class Period”). Baker Decl. ¶4. This class has not yet been certified.

Settlement Efforts

Since the commencement of the litigation, class counsel and defense counsel have worked diligently and cooperatively to analyze this case at an early time through significant informal discovery and informal fact finding to investigate the factual and legal strengths and weaknesses of this case, have reviewed and evaluated relevant documents, meet with their respective clients and have engaged in extensive legal research and analysis regarding the Parties' respective positions on the issues raised by the Complaint. Baker Decl. ¶5.

On February 13, 2007, the parties and their attorneys participated in an Early Neutral Evaluation Conference with the Honorable Judge Louisa S. Porter in connection with the *Mendoza* matter. Despite best efforts, the parties were unable to reach a settlement.

On June 27, 2007, the parties and their attorneys participated in a private mediation before

1 Michael J. Roberts, Esq. of ADR Services, Inc. for both the *Mendoza* and the *Hernandez* matters.
2 Attorney Roberts is an experienced, highly regarded mediator in San Diego County. Despite
3 mediation efforts covering more than ten hours that day, the parties did not settle the case that day,
4 but continued settlement negotiations and discussions thereafter. Since then, the parties have
5 reached an agreement within the same framework proposed by Mediator Roberts, with respect to all
6 core settlement terms of both the *Mendoza* and *Hernandez* matters. Baker Decl. ¶6. The *Mendoza*
7 and *Hernandez* settlement agreements are attached as Exhibits “A” and “B” to the Declaration of
8 Jason E. Baker filed concurrently herewith.

9 These settlements, if approved by this court in *Mendoza* and San Diego Superior Court in
10 *Hernandez*, will resolve all claims and issues of the putative class of Pumper Driver in both actions.

11 **C. The Settlement Agreement.**

12 The combined total value of the settlement of both *Mendoza* and *Hernandez* (if approved)
13 is approximately \$515,000, inclusive of all payments to class members, attorneys fees, costs, and
14 settlement administration, if all class members submit a valid and timely Proof of Claim form.
15 Additionally, class members have received a benefit of approximately \$350,000 from a separate
16 settlement of wage and hour claims through the United States Department of Labor in or around
17 December, 2006. Baker Decl. ¶8. It is the belief of counsel for the respective parties that these
18 settlements fairly compensate the class for the alleged wage and hour violations.

19 Under the terms of the parties’ settlement agreement in *Mendoza* (if approved), Plaintiffs
20 Juan Mendoza and Agustin Fernandez will each dismiss with prejudice their individual claims in this
21 action and each receive \$30,000, allocated as \$10,000 in full and final settlement of their wage and
22 hour claims and confidentiality and waiver of all other claims, known or unknown; \$10,000 for
23 incentive award for their efforts as class representatives for the putative class of Pumper Drivers in
24 the *Mendoza* matter and \$10,000 for an agreement not to seek future employment from Defendants,
25 or any affiliated company. Additionally, the class claims in *Mendoza* will be stayed pending
26 resolution of those claims in state court as part of the *Hernandez* matter. The parties anticipate the
27 proposed settlement in *Hernandez* will be approved, and upon that occurrence, the parties will
28 forthwith jointly request the class claims in *Mendoza* be dismissed with prejudice.

1 As proposed, Plaintiffs Mendoza and Fernandez will receive only the proceeds set forth
2 above and neither will participate in the remaining settlement proceeds of the *Hernandez* action.
3 Plaintiffs' counsel is not seeking an award of fees or costs in connection with the *Mendoza*
4 settlement, but will do so as part of the *Hernandez* matter on the basis of the settlement of both
5 actions. In other words, other than the proceeds to be paid to Plaintiffs Mendoza and Hernandez, all
6 remaining settlement proceeds will be subject to court approval in the *Hernandez* action.

7 Importantly, to facilitate settlement and not prejudice the putative *Mendoza* class, the parties
8 have included in the *Hernandez* settlement agreement a provision that the class period in the later
9 filed *Hernandez* action will begin on December 11, 2003, three years from the filing of the complaint
10 in the earlier *Mendoza* case. Baker Decl. ¶10. Thus, the putative class in *Hernandez* is not
11 prejudiced by resolving this matter in state court. If, however, the *Hernandez* settlement is not
12 ultimately approved, Plaintiffs can seek to reinstate the class claims only in the *Mendoza* action.

13 Plaintiffs and Defendants seek an order of this Court (i) approving the settlement of claims
14 raised by Plaintiffs Juan Mendoza and Augustine Fernandez in this case for \$30,000 each, allocated
15 as \$10,000 in full and final settlement of all claims, including their wage and hour claims, \$10,000
16 for incentive award for their efforts as class representatives for the putative class of Pumper Drivers,
17 and \$10,000 for an agreement not to seek future employment and (ii) staying the claims of the non-
18 certified putative class of employees in this action pending pursuit and resolution of those claims in
19 the corresponding *Hernandez* action.

20 III.

21 LEGAL STANDARD FOR COURT APPROVAL OF CLASS ACTIONS.

22 Federal Rule of Civil Procedure 23(e) provides that the Court “must approve any settlement,
23 voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.” Fed. R.
24 Civ. P. 23(e). Approval under 23(e) typically involves a two-step process in which the Court first
25 determines whether a proposed class action settlement deserves preliminary approval and then, after
26 notice is given to class members, whether final approval is warranted. *See Manual for Complex*
27 *Litigation, Third*, § 30.41, at 236-237 (1995).

28 The “universally applied standard” in determining whether a court should grant final approval

1 to a class action settlement is whether the settlement is “fundamentally fair, adequate, and
 2 reasonable. 5 Moore Federal Practice, § 23.85 (Matthew Bender 3d ed.) (citing *In re Pacific Enters.*
 3 *Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995) and *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,
 4 1276 (9th Cir. 1992), *cert denied*, 506 U.S. 953. The Ninth Circuit has considered, if applicable,
 5 eight factors in determining whether a proposed class action settlement is fair, reasonable, and
 6 adequate². See *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); see also
 7 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). However, not all of these factors
 8 will apply to every class action settlement, and, under certain circumstances, one factor alone may
 9 prove determinative in finding sufficient grounds for court approval. See, e.g., *Torrissi v. Tucson*
 10 *Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

11 Furthermore, “[d]istrict courts have wide discretion in assessing the weight and applicability
 12 of each factor.” 5 Moore’s Federal Practice, § 23.85[2][a] (Matthew Bender 3d ed.). “The relative
 13 degree of importance to be attached to any particular factor will depend upon and be dictated by the
 14 nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances
 15 presented by each individual case.” *Officers for Justice v. Civil Service Somm’n of the City and*
 16 *County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). “Ultimately, the district court’s
 17 determination is nothing more than an ‘amalgam of delicate balancing, gross approximations, and
 18 rough justice.’” (quoting *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 468 (2d Cir. 1974)). “The
 19 initial decision to approve or reject a settlement proposal is committed to the sound discretion of the
 20 trial judge.” *Officers for Justice*, 688 F.2d at 625.

21 IV. 22 DISCUSSION.

23 Here, the procedural status of this class action is unusual in that there are parallel class action
 24 cases involving the same claims and issues being litigated in both state and federal courts, neither

25 ²Those factors are 1) the strength of plaintiff’s case; 2) the risk, expense, complexity, and
 26 likely duration of further litigation; 3) the risk of maintaining class action status throughout the trial;
 27 4) the amount offered in settlement; 5) the extent of discovery completed and the stage of the
 28 proceedings; 6) the experience and view of counsel; 7) the presence of a governmental participant;
 and 8) the reaction of the class members to the proposed settlement. See *Linney v. Cellular Alaska*
P’ship, 151 F.3d 1234, 1242 (9th Cir. 1998); see also *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
 1026 (9th Cir. 1998).

1 of which is certified. For the reasons discussed below, and because the parties have agreed that the
 2 state court in the *Hernandez* action will hear the forthcoming motions for preliminary and final
 3 approval, a typical analysis of the factors set forth in *Linney v. Cellular Alaska P'ship*, 151 F.3d
 4 1234, 1242 (9th Cir. 1998) may be irrelevant and unnecessary. Rather, as discussed further below,
 5 this memorandum seeks approval by of the Mendoza settlement by demonstrating its fairness and
 6 lack of prejudice to the *Mendoza* class.

7 A. The Individual Settlements Fairly Compensate Plaintiffs For Their Claims.

8 Under the *Mendoza* settlement, Plaintiffs Mendoza and Fernandez will each receive a total
 9 of \$30,000, allocated as \$10,000 in full and final settlement of all claims, including their wage and
 10 hour claims, \$10,000 for incentive award for their efforts as class representatives for the putative
 11 class of Pumper Drivers and \$10,000 for an agreement not to seek future employment. This
 12 proposed settlement is intended to compensate Plaintiffs for their efforts and claims.

13 Plaintiffs represent, and Defendants do not contest for purposes of this settlement the
 14 following: Each of Plaintiffs Mendoza and Fernandez made significant contributions and were
 15 instrumental to settlement of both the *Mendoza* and *Hernandez* matters. Each was willing to initially
 16 come forward and pursue a claim on behalf of the putative class(es). Similarly, each was willing to
 17 spend significant time with Plaintiff's counsel developing both cases, reviewing documents,
 18 interviewing witnesses and putative class members, including providing translation when necessary.
 19 Plaintiff *Mendoza* participated in two mediation sessions, and Plaintiff *Fernandez* participated in one
 20 mediation session and was on telephone standby for the other mediation, including preparation
 21 therefor, including travel time and missed time from work. Without their contributions, neither
 22 settlement would likely have come to fruition.

23 This amount is considered significant by the Plaintiffs, considering that they each were
 24 earning roughly \$30,000 *per year* while employed with Defendants. The proposed settlement
 25 amount compensates them for a substantial portion of their maximum claim value³. Because Mr.
 26 Mendoza and Mr. Fernandez are receiving compensation for their claims and roles as class

27
 28 ³ This is also slightly more than what was offered to Plaintiffs at the Early Neutral Evaluation
 ("ENE"), and thus, compensates them for the additional effort in pursuing the *Mendoza* matter after the ENE
 and for assisting with the *Hernandez* matter.

1 representatives in this action, they will not be submitting claims in the *Hernandez* action, and will
2 not be receiving incentive awards for their roles in that action.

3 Because of the above, the Court should grant this motion.

4 B. The San Diego Superior Court Will Adequately Protect The Interests Of The Class
5 In Deciding Whether To Approve The Parties' Settlement Agreement.

6 The central issue of this motion is whether the putative class will be prejudiced by the
7 settlement in this action. Here, there is no prejudice to the putative class because the parties have
8 already reached a settlement of the *Hernandez* matter which, if approved, will include all putative
9 class members of *Mendoza* and encompass *Mendoza's* earlier class period. Essentially, the class
10 claims stayed in *Mendoza* are proposed to be settled in the *Hernandez* action and ultimately
11 dismissed in *Mendoza*, pending approval of the state court, and fulfillment of the terms of the
12 *Hernandez* settlement agreement.

13 Additionally, if the Court determines that it should dismiss the *Mendoza* class claims, the San
14 Diego Superior Court (Hon. Judge Michael Anello) will remain a key participant in the *Hernandez*
15 action, to ensure the proposed settlement agreement is fair to the putative class. The standard in
16 California for determining whether to approve a class action settlement is almost identical to the
17 federal standard and factors set forth in *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th
18 Cir. 1998). In California, when considering settlement at the final settlement hearing, the court's
19 primary concern is whether a class settlement, taken as a whole, is fair, adequate and reasonable.
20 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; and *7-Eleven Owners for Fair*
21 *Franchising, supra*, 85 Cal.App.4th at 1151. As stated by the Court in *Dunk*, "a presumption of
22 fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2)
23 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
24 counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*,
25 *supra*, 48 Cal.App.4th at 1802. All of those factors are satisfied in both the *Mendoza* and *Hernandez*
26 settlements.

27 Moreover, the claims pleaded in the proposed First Amended Complaint of *Mendoza*
28 eliminate federal claims thereby leaving the remaining claims based on California law, by California

1 residents against a California company that does business only in California. Thus, San Diego
2 Superior Court is especially appropriate for determining whether the ultimate class settlement is fair
3 and should be approved.

4 Because the San Diego Superior Court will adequately protect the interests of the class in
5 deciding whether to approve the parties' settlement agreement, the Court should give final approval
6 to: 1) the parties' settlement agreement in *Mendoza*; and 2) request to stay the remaining class
7 claims in *Mendoza*.

8 C. Notice Prior To Final Settlement Of This Action Should Not Be Required

9 "[I]t is generally recognized that class notice may properly be waived in the court's discretion
10 without first denying the class aspects, provided the court determines that no prejudice to the class
11 will result." Conte & Newberg, 5 Newberg on Class Actions, § 11:71 (4th ed.); *see also Larkin*
12 *General Hospital, Ltd. v. American Tel. & Tel. Co.*, 93 F.R.D. 497 (E.D. Pa. 1982) (no notice
13 required where no possibility of any collusive settlement or prejudice to the class); *Wallican v.*
14 *Waterloo Community School Dist. in Black Hawk County*, 80 F.R.D. 492 (N.D. Iowa 1978) (no
15 notice where no danger of collusion between the parties or of a sell-out of the asserted class by the
16 plaintiffs.

17 Here, no notice of settlement is needed because the only claims extinguished in the *Mendoza*
18 matter are those of Plaintiffs Mendoza and Fernandez. All other putative class members of *Mendoza*
19 are adequately protected in the *Hernandez* matter, whereby they will receive appropriate notice of
20 the settlement and opportunity to opt out and object, and are otherwise stayed in this action. In fact,
21 the parties in *Hernandez* receive greater protection because the settlement agreement of the parties
22 in *Hernandez* uses the earlier class period of *Mendoza*. Thus, no prejudice to the putative class will
23 result if this settlement agreement is approved and this action is stayed pending approval of
24 *Hernandez*. If the *Hernandez* settlement is rejected, the class members will still have their day in
25 court.

26 V.
27 CONCLUSION.

28 Because Plaintiffs' compensation for their individual claims is fair, and because the San

1 Diego Superior Court will adequately protect the interests of the class in deciding whether to approve
2 the parties' settlement agreement in the *Hernandez* action, the Court Order: (i) approval of the
3 settlement of claims raised by Plaintiffs Juan Mendoza and Augustine Fernandez in this case for
4 \$30,000 each; and (ii) staying the claims of the non-certified putative class of employees in this
5 action pending pursuit and resolution of all claims in the corresponding *Hernandez* action.

6
7 Respectfully submitted,

8 **KEEGAN MACALUSO & BAKER, LLP**

9
10 Dated: August 27, 2007

By: s/Jason E. Baker
Jason E. Baker, Esq.
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Attorneys for Plaintiffs

13 **LITTLER MENDELSON**

14 Dated: August 27, 2007

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